The Solicitors' Journal

Vol. 97 August 15, 1953 No. 33

CURRENT TOPICS

Solicitors as Town Clerks

PROMINENCE is again being given in the local government Press to demands which are made in certain quarters that town clerks should not as a rule be trained as or recruited from lawyers. Mr. BRYAN KEITH LUCAS, in an article in the current issue of *Public Administration*, quotes the opinion of the Hadow Committee in 1934 that town clerks should be trained as administrators rather than as lawyers, and adds that local authorities have consistently ignored that advice. A writer in "Notes of the Week" of the *Local Government Chronicle* of 1st August comments: "We have always thought it strange that alone of the experts the lawyer should be regarded as fit to attain to the highest administrative office on the staffs of local authorities. We believe that in the United States the tendency is for the chief executive officer of a city to be an engineer, and we would go so far as to say that this is at least more logical than our system. We notice the same tendency in the civil service. . . ." The remedy for this state of affairs surely lies with the local authorities themselves, and it is up to them to follow Mr. Keith Lucas's advice, and search among graduates in history, economics, philosophy and politics for their chief officers. Apart from natural bias in believing that solicitors can undertake any administrative job, however complex, our view is that, as the point at which the big local authority, whether as planning authority or in its other functions, may conflict with the rights of individuals, the office of town clerk can be adequately filled only by a person with a sound professional training in law. Nor does the statement by Mr. N. F. E. BROWNING, in his letter in the same issue, that local government should fall into line with industry and commerce and merely appoint private solicitors to do their legal business, carry any weight as an argument. The two types of organisation are not *in pari materia* and cannot be compared with one another.

Articled Clerks and Premiums

IN considering the fitness of solicitors to be town clerks, the writer in "Notes of the Week" of the 1st August issue of the *Local Government Chronicle* asks: "Are we not depriving ourselves of the services of many able officers by making it so comparatively difficult for young men and women to be solicitors?" Since before the war, he writes, more articled clerks are accepted without premium and more salaries are paid during articles, but there are still many solicitors who will not take an articled clerk without a premium. He recalls that in 1943, at the annual meeting of The Law Society, a resolution calling for the consideration of the abolition of premiums was narrowly defeated. He recommends, in particular, that town clerks and other solicitors in the service of local authorities should be willing and permitted to give articles to any member of their staff who shows sufficient promise and that they also should be prepared to give articles to university graduates. The argument, if it has any validity, that as solicitors handle money they or

CONTENTS

their fathers should have financial substance, the writer thinks, clearly does not apply to the public service, in which solicitors do not normally themselves handle large sums of money.

Defence (General) Regulations, 1939: Three Revocations

THREE of the Defence (General) Regulations, 1939, have been revoked as from 5th August by Orders in Council made on 1st August. They are reg. 62A, which empowered local authorities to adapt and let for use as allotment gardens land in their occupation, unoccupied land to the possession of which they are entitled and land forming part of a park or open space under their management or control; reg. 16, which empowered the Minister of Fuel and Power by order to provide for the stopping up or diversion of highways and for prohibiting or restricting the exercise of rights of way and the use of waterways, if he considers it necessary so to do for the purpose of working open-cast coal; and reg. 2BA, which empowered the Secretary of State by order to impose restrictions or prohibitions on the keeping of, and the transfer of the possession of or property in, explosives, in addition to any prohibitions or restrictions imposed by the Explosives Act, 1875. The orders effecting these revocations are, respectively, the Defence Regulations (No. 9) Order, 1953 (S.I. 1953 No. 1217), the Defence Regulations (No. 7) Order, 1953 (S.I. 1953 No. 1214), and the Defence Regulations (No. 8) Order, 1953 (S.I. 1953 No. 1216).

Revocation of Certain Defence (Finance) Regulations, 1939

AN Order in Council made on 1st August has revoked as from 5th August the following regulations of the Defence (Finance) Regulations, 1939: reg. 1 (acquisition by Treasury of certain securities), reg. 1A (power of Treasury to direct sale of certain securities), reg. 1B (custody and disposition of documents of title to certain securities), reg. 5A (power of Treasury to exempt securities from provisions of reg. 1), reg. 7 (exemption from stamp duty), and reg. 9A (provision as to payments by Treasury). The revoking order is the Defence Regulations (No. 6) Order, 1953 (S.I. 1953 No. 1207).

The New Despotism Again

How similar are the problems confronting all democratic constitutions to-day is well illustrated in a review by Mr. FRANK W. GRINNELL, editor-in-chief, in the *Massachusetts Law Quarterly* for June, 1953, of "The Passing of Parliament," Professor G. W. KEETON'S recently published work. The quotations made by Mr. Grinnell underline the fears of enlightened Americans. He quotes Professor Keeton as saying (on the report of the Committee on Ministers' Powers, in 1929): "Indeed few reports have assembled so much wisdom, whilst proving so completely useless . . . Its recommendations are forgotten, even by lawyers and administrators." He also quoted: "To-day in Great Britain we live on the edge of dictatorship. Transition would be easy, swift, and it could be accomplished with complete legality . . . To-day, virtually, our only remaining constitutional safeguard is the habit of tolerance and the existence of a powerful political opposition, both of which owe their existence to the Revolution of 1688." Mr. Grinnell comments: "The fact that the renowned 'unwritten' English constitution no longer protects Englishmen should make us do some old-fashioned hard thinking such as some of the 'Founding Fathers' did in the eighteenth century, when they applied the lessons of history in framing 'Our Glorious Heritage' about which there appears to have been more oratory than thinking of recent years." Whether it is right to regard either the existence of Her Majesty's Opposition, or of a spirit of tolerance, as small obstacles in the way of dictatorship, or to hold that the British constitution does not protect Englishmen, it is a good thing that thinking on the subject of threats to our freedom is being conducted on both sides of the Atlantic.

Stop-Watch Litigation

A HINT on how to lessen litigation costs may be taken from the report on this year's season of excavations in the Agora, or market place, of ancient Athens, issued by Professor HOMER THOMPSON, of the Institute for Advanced Studies, in Princeton. On a site now thought to be that of one of the law courts of the old city a number of bronze tablets were found, which were used by members of the jury to record their votes. The report recalls that twenty years ago some workmen discovered on the same site a clepsydra, or water clock, used to measure the length of speeches in the court. The inference may be drawn that some procedure as to time limits was imposed, analogous to the "guillotine" in the House of Commons. Judges to-day are obliged to resort to more subtle, but less generally successful, methods of shortening speeches, especially when they have reason to think that the advocate is "flogging a dead horse." Even that process, as every wise judge knows, is sometimes necessary if justice is to be manifestly seen to be done, for few litigants realise they have lost until the judge finally tells them, or, perhaps, understand completely why they have lost. If they see what looks like a good fight and an impartial hearing they feel that justice has been done, even if they do not feel that they have had their money's worth. They have got the grievance out of their system by fair argument, and that is the way of the common law. On the whole, we must record our vote against the use of either water clocks or stop watches in the law courts. In the matter of justice, the race is not to the swift, nor can it be meted out in measures of time. Besides, a long speech is not always a bad speech, nor is a short speech necessarily good.

The *Law Quarterly*

THE July issue of the *Law Quarterly* contains an article by The Right Hon. Lord Justice MORRIS on "The Courts and Domestic Tribunals" in which the writer surveys the principles upon which resort to the courts may be obtained when a decision is taken within a private organisation which may vitally affect the fortunes or the reputation of those concerned, whether members of trade unions, professional organisations, or social clubs. The principles underlying the club cases, he writes, are similar to those governing the attitude of the courts to the awards of arbitrators, where the courts will intervene for misconduct by the arbitrator or for error in law on the face of the award. Writs of prohibition and certiorari, he points out, are never used to control lay arbitrators. The court will intervene where a domestic tribunal has acted on a wrong interpretation of its rules, or where its proceedings are not fairly conducted. Lord Justice Morris also discusses *Abbott* v. *Sullivan* [1952] 1 K.B. 189, where the question of damages against the committee of a members' club arose. In the same issue, the editor, Professor Sir ARTHUR L. GOODHART, K.B.E., Q.C., criticises some of the decisions on damages for emotional shock, and in particular *King* v. *Phillips* [1953] 2 W.L.R. 526, in an article on "Emotional Shock and the Unimaginative Taxicab Driver." Both of these articles are significant contributions to the thought and learning on their respective subjects. The remainder of the *Quarterly* reaches its usual high standard.

A Conveyancer's Diary

FISHING TENANCIES

THIS is a seasonable topic at this time of the year, and the recent decision in *Proctor* v. *Avon and Dorset River Board* (reported in *The Times* newspaper on the 1st August) affords an excellent opportunity to raise it.

The proceedings in this case took the form of a motion (which by agreement was treated as the trial of the action) by the plaintiff asking for an injunction to restrain the river board from causing or permitting dredging operations in the Dorset Stour, which, the plaintiff alleged, interfered with certain rights of fishing in the river to which an angling society was entitled under a lease. The plaintiff was the secretary of, and sued on behalf of, the angling society, which was thus the real plaintiff in this action. The defendant board was a board constituted under the River Boards Act, 1948, and as a result of the combined operation of that Act and the Land Drainage Act, 1930, it had certain powers and duties in regard to land drainage in the area through which the River Stour flowed. (In the course of his judgment, Harman, J., observed that it was extremely difficult to understand the relationship of these two Acts. One may add that it is sometimes extremely difficult to understand the relationship of various parts of the same Act. Thus, apparently, "although Catchment Boards were within the definition of drainage boards because by s. 1 [of the Land Drainage Act, 1930] catchment areas are drainage districts and by s. 3 the drainage board of a catchment area is the Catchment Board, it is not easy to ascertain what exactly are the powers and duties of Catchment Boards because of the way in which the Act has been drafted"—Coulson and Forbes on Water and Land Drainage, 6th ed., p. 766. Where experts find the way so hard to follow, a stranger to the subjects will almost inevitably lose himself altogether. But, fortunately, the parts of these Acts immediately relevant to the point which I wish to make on this decision are relatively simple.)

The board, without notice to the society, dredged the bed of the river, where the fishing to which the society was entitled was situated, with mechanical dredgers, digging out all the shallows in the river and generally lowering the river bed. These operations, the plaintiff alleged, had destroyed some shallows where the fish had been used to spawn, and had made the banks steep and difficult for anglers to climb. The board relied on the powers conferred upon it by s. 34 of the Act of 1930, and the evidence given on behalf of the board was that the operation had prevented flooding in the locality and improved surrounding land for agriculture.

Harman, J., dismissed the plaintiff's motion. His judgment is shortly reported, and as reported does not really go to the root of the decision. As reported, the learned judge first dealt with the evidence of damage to the plaintiff, which in his view was not very satisfactory, and then went on to make the observations already referred to about the relationship of the Acts of 1930 and 1948, respectively. As will be seen, s. 34 empowers river boards in certain circumstances to enter land in order to carry out their functions as drainage authorities, but the plaintiff claimed that this power had to be read subject to s. 62 (2) of the Act of 1930, which reads: "In the exercise of the powers conferred by this Act due regard shall be had to the fishing interests." The defendant board, according to the plaintiff, had paid no regard to the society's fishing interest in the river. As to this, the learned judge thought that this phrase was a "pious ejaculation which was put into the Act when the drainage enthusiasts were met by the fishing interests." It was difficult to assess what "due regard" meant, and impossible on the evidence to say that the board had acted *ultra vires*. Finally, the learned judge referred to s. 4 (1) of the Salmon and Freshwater Fisheries Act, 1923, which prohibits under penalty any disturbance of spawning fish or places where fish spawn; but in his judgment the evidence was too shadowy to say that there had been an infringement of this provision, even if the board was not exempt from it, as he thought it was, on the authority of *Marriage* v. *East Norfolk Rivers Catchment Board* [1950] 1 K.B. 284.

That is this case as reported, but to understand it fully it is necessary to refer in somewhat greater detail to the provision upon which the board relied as empowering it to do the work in question. That is s. 34 of the Act of 1930, which, so far as material, provides as follows. Under subs. (1) every drainage board (which by reason of s. 4 of the River Boards Act, 1948, now includes a river board) has power (*a*) to maintain existing works, (*b*) to improve existing works, and (*c*) to construct new works. These powers are extensively defined, and in the case of (*b*), which is the particular power relied upon by the board in this case, to improve existing works is expressed as meaning to deepen, widen, straighten or otherwise improve any existing watercourse, or to remove mill dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve any existing drainage work. Under subs. (3), where injury is sustained by reason of the exercise by a drainage board of any of its powers under the section, the board is made liable to pay full compensation to the injured person, the amount, in the event of dispute, being determinable by the Lands Clauses Acts. And finally, by subs. (4), it is declared that nothing in the section authorises any person to enter on the land of any person except for the purpose of maintaining existing works, i.e., except where the power which the board desires to exercise is the power (*a*) above mentioned.

The effect of subs. (4) of s. 34 is that if a board wishes to exercise either of the other powers conferred by the section, viz., the power to improve existing works or the power to construct new works, and it is necessary, as it must nearly always be necessary when works of these kinds are contemplated, to enter on the land of another person to carry out the desired works, the consent of that person to such entry must be obtained by the board. In the present case, the defendant board did obtain the consent of the owner of the bed and banks of the river at the place in question, but it did not obtain the consent of the society. Now the society, as it happened, was not the tenant of the bed and banks of the river; it merely had a licence, for a term of years, to fish in and take fish from the river. The board thus argued that, as the society had no land, and no interest in any land, in respect of entry on which the consent of the society could be necessary under s. 34 (4), the society's consent was unnecessary. The society, in answer to this, pointed to the definition of the expression "land" in s. 81 of the Act, which is there expressed to include water and any interests in land or water and any easement or right in, to, or over land or water. Basing itself on this, the society went on to argue that as one effect of the licence to fish to which it was entitled had been to confer upon the society a profit *à prendre*, it was entitled to a right in or over water within s. 81, which by definition signified land. On this footing, it was argued, despite the limited interest which the society possessed in the

river, its consent was necessary before the board could enter on the river bed and banks.

The learned judge refused to accede to this argument, on the ground that the definitions contained in s. 81 of the Act are to have effect unless the context otherwise requires, and the context of s. 34 (4) did require that "land" there should not include a right in the nature of a profit, because the subsection speaks of entry on land, and it is impossible to enter, in that sense, on a profit.

If one may say so, this decision on the construction of s. 34 (4) is clearly right; but it does reveal a considerable hole in the protection to which people who own valuable rights of fishing may not unreasonably think they should be entitled. True, if a river board enters and interferes with fishing rights in exercise of its powers under s. 34 (1), compensation for disturbance of these rights may be obtained under s. 34 (3). But compensation is not what the owner or tenant of fishing rights usually wants. By tradition a peaceful person, the angler wants above all to be left in peace, and to have an authority altering the whole aspect of his river (for the effect of work with modern dredging equipment may be to turn a meandering stream into something little better than an artificial drainage canal) is something for which no monetary compensation can really compensate. It is obvious, therefore, that if a tenant of a fishery is to be able to protect himself against the kind of interference which befell the angling society in this case, he must be given a sufficient interest in the premises to bring him within the scope of s. 34 (4).

Fortunately, that is not difficult. Most fishing "leases" at present take the form of a licence to fish—see, for example, the forms in the current editions of Key and Elphinstone and Prideaux. A lease in this form reserves to the lessor the bed and banks of the river, but those are of little use to him if the only valuable water right is the fishing, and that is out of his hands. But if the lease takes the form of a lease of the bed and banks of the river, with such ancillary rights as may be necessary to enable the tenant to enjoy the premises, the tenant has an interest in land which will make his consent necessary to any entry by a river board on what will be his land (viz., the bed of the river) during the currency of the term, and provided that suitable reservations are made in favour of the landowner for such matters as the watering of cattle, the landowner will be no worse off than he would be if all that he had granted were a mere licence. That is the lesson which this case has for the conveyancer.

"A B C"

Landlord and Tenant Notebook

VARIATION OF RENT OF AGRICULTURAL HOLDING

THE question whether rented agricultural land should be nationalised has recently been the subject of political speeches and of correspondence in *The Times*, and while it is not for me, as a contributor to this paper, to take sides in such a question, I do note that some of the utterances appear to assume that farm rents are restricted in the same way as those of most dwelling-houses. And, as the Michaelmas quarter day is not far off, it may be useful to draw attention to s. 8 of the Agricultural Holdings Act, 1948, headed "Arbitration on terms of tenancies as to rent," approaching the subject from a landlord's point of view. (A farmers' periodical observed, a few months ago, that increases in rents had not kept pace with increases in landlords' outgoings and this will justify such an approach; it is likely that landlords will wish to avail themselves of the section more than tenants.)

The enactment, introduced by the Agriculture Act, 1947, of which the whole of the Agricultural Holdings Act, 1948, was formerly a part, was not entirely novel; that is to say, under the Agricultural Holdings Act, 1923, a landlord might invite a tenant to arbitrate as to rent, and, if the invitation were declined, determine the tenancy without having to pay compensation for disturbance. The Agricultural Holdings Act, 1948, s. 8, operates without any question of determination, though not (as will be seen) of term, arising; if authority be needed for this proposition, it will be found in *Wallingford* v. *Tench* (1951), Estates Gazette Digest 22.

It will be convenient to consider the subject under the following heads: How soon and how often can a reference be demanded? What matters are relevant to the reference? and When will an award take effect? The order I have given is, *prima facie*, the logical one; but the provisions of the section are such that it is best to take the first-mentioned and last-mentioned heads together.

The reference to be demanded is a reference "of the question what rent should be payable in respect of the holding as from the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of demanding the reference" (subs. (1)), and "shall not be demanded . . . in such circumstances that any increase or reduction of rent made in consequence thereof would take effect as from a date earlier than the expiration of three years from any of the following dates, that is to say, (*a*) the commencement of the tenancy, or (*b*) the date at which there took effect a previous increase or reduction of rent (whether made under this section or otherwise), or (*c*) the date at which there took effect a previous direction of an arbitrator under this section that the rent should continue unchanged"; there follow provisos excluding or declaring the exclusion of certain special increases and reductions made under other sections, those providing for variation on the occasion of modification of a tenancy agreement so as to bring it into conformity with the maintenance of fixed equipment regulations, increases made on the ground of improvements, etc.

As was the case under the 1923 Act, then, no change can come into effect before a notice to quit, given at the time when the first step is taken, could expire; hence my mention, in my first paragraph, of Michaelmas. Any landlord of a farm let, as most farms are, on a yearly tenancy running from 29th September—or, for that matter, of a farm let for a term of years expiring 29th September of next year—should demand a reference within the next few weeks if he wants the desired increase to take effect at Michaelmas, 1954, and not at Michaelmas, 1955.

So much for how soon and how often. The question of how much is more difficult. "On a reference . . . the arbitrator shall determine what rent should properly be payable in respect of the holding at the date of the reference" (subs. (1)); anyone who has had anything to do with the fixing of reasonable rents under the Furnished Houses (Rent Control) Act, 1946, or the Landlord and Tenant (Rent Control) Act, 1949, or under s. 5 of the Landlord and Tenant Act, 1927, will appreciate the difficulty. In this case, the section

affords a little help by directing the arbitrator to exclude from consideration a number of factors; one might complain that these directions are mainly otiose, as the irrelevance is mostly self-evident; but perhaps one should be grateful for the avoidance of possible argument. The arbitrator is to ignore increased rental value due to improvements executed by the tenant without any allowance or benefit made or given by the landlord, or by the landlord in so far as he received grants out of moneys provided by Parliament in respect of the execution; he is also to ignore the Local Government Act, 1929, de-rating of agricultural land. He is not to reduce rent by reason of dilapidations, etc., caused or permitted by the tenant; I will say something about this direction later. But what *is* he to take into account? In his book on Agricultural Arbitrations, Mr. R. C. Walmsley has devoted a considerable amount of thought to the question and would make the main basis the amount which "a prudent tenant (who would be a 'capable keen younger farmer') might reasonably be expected to offer and a properly advised landlord might reasonably be expected to accept on an open-market letting of the holding, but excluding scarcity value." I am not inclined to quarrel with this proposition based on a careful examination of considerations to be found in the section itself and outside it, but I do perhaps feel more difficulty about giving effect to one of the statutory directions than does the author of the work concerned.

This particular direction is to be found in subs. (2) (*c*), by which the arbitrator "shall not fix the rent at a lower amount by reason of any dilapidation or deterioration of, or damage to, buildings or land caused or permitted by the tenant." What is not clear is whether "culpably" or "wrongfully" is to be read into the subsection, qualifying the "caused or permitted." What Mr. Walmsley calls the "statutory repair clause"—the incorporation of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948—is, as he remarks, likely to be increasingly used; but what is enacted by s. 6 (1) is that they are deemed to be incorporated in a tenancy agreement which makes no provision in writing imposing liability on the party on which they do not impose it, while *ib.* (2) entitles, but does not oblige, a party to an agreement which "effects substantial modifications in the operation of the regulations" to have the tenancy agreement varied "so as to bring it into conformity with" the regulations, by arbitration, if necessary. Consequently, it would seem that a nice problem might confront an arbitrator under s. 8 if it appeared, say, that drains were out of order; that the tenancy agreement made the landlord responsible for their repair; and that he had not been informed of the trouble. If the landlord contended that the dilapidation was caused or permitted by the tenant, the tenant might point to the agreement; and if the landlord referred to para. 5 of the regulations, the tenant could say that it was hardly his fault if the agreement had not yet been varied (and that if and when it was varied another variation of rent could be made, under s. 7 (3)). But, if the tenant had indeed neglected to report the defects, I suggest that there would still be room for a finding that the dilapidation was caused or permitted by the tenant, in accordance with the rule by which a landlord covenantor's liability depends on notice (*Makin* v. *Watkinson* (1870), L.R. 6 Ex. 25).

R. B.

PRACTICAL CONVEYANCING—LXIII

REGISTRATION OF ESTATE CONTRACT

THE necessity for registering a contract to purchase in the land charges register as an estate contract was discussed *ante*, p. 348. It was there stated that "perhaps the greatest advantage of registering an estate contract arises in the event of a dispute which results in a threat by the vendor to rescind and resell the property. The registration is a considerable obstacle to hasty action." One might even go further and say that registration can, in some cases, put an unfair burden on a vendor.

The matter is mentioned again because the recent case of *Re Engall's Agreement* [1953] 1 W.L.R. 977; *ante*, p. 506, has illustrated the effect of registration. Readers will recollect that the facts of this case were stated and the reasoning of the decision discussed *ante*, p. 531. An estate contract had been registered and the vendor wished to have it removed so that he could resell on alleged default of the purchaser. Vaisey, J., decided that a summons under the Land Charges Act, 1925, s. 10 (8), asking for an order that the registration should be vacated, was not the proper procedure. His reason was that the substantial issue should be raised, namely, whether or not the contract still existed, by an action for specific performance or for rescission. In taking this view Vaisey, J., was following his own decision in *Pedigree Stock Farm Developments, Ltd.* v. *R. Wheeler & Co., Ltd.* (1950), 155 *Estates Gazette* 66, and it is interesting to note that, although the authority was not quoted in *Re Engall's Agreement*, the same principle emerged from another earlier decision of Vaisey, J., namely, *Jones* v. *Browne* (1945), 146 *Estates Gazette* 9. There a transaction was registered which the owner alleged did not amount to a contract to sell and an application for an order for removal of the entry was refused.

In *Re Engall's Agreement* there was doubt as to whether the notice to complete was deficient in point of time (see the comments *ante*, pp. 531, 532). Consequently, there may have been a substantial issue in the question whether or not the contract remained in existence. The writer is inclined to suggest, therefore, that the decision may not have as wide an application as at first sight appears. If there had been no doubt about the operation of the notice it could then have been alleged that there was no longer a contract in existence and that the procedure under the Land Charges Act, 1925, s. 10 (8), was properly taken. Unfortunately, the report of *Re Engall* does not indicate whether the vendors knew, before they issued their summons, that the continued existence of the contract was alleged. One would be inclined to suggest that if a notice to complete is apparently valid and the purchaser has not given a reason why he alleges that the contract remains binding, the vendor may properly assume that he may attack the registration only by means of a summons under s. 10 (8). It may be significant that in all three cases before Vaisey, J. (*Jones* v. *Browne*; *Pedigree Stock Farm Developments, Ltd.* v. *R. Wheeler & Co., Ltd.*; *Re Engall's Agreement*), there has been a question as to the existence of the contract. Where this is not the case it would not seem proper that the making of an entry on the land charges register should compel the vendor to take an action for rescission or specific performance.

J. G. S.

At the Law Society's Final Examination held on 15th, 16th and 17th June, 1953, 250 candidates were successful out of 464. The Council have awarded the following prizes: to R. H. Lloyd, B.A. (Cantab.), the Edmund Thomas Child Prize, value £19; and to G. Lazarus, LL.B. (Lond.), and V. D. Zermansky, LL.B. (Leeds), jointly, the John Mackrell Prize, value £15. At the Preliminary Examination held on 6th, 7th, 8th and 9th July, 1953, 22 candidates were successful out of 64.

HERE AND THERE

NO ROAD

THIS is the dead season of the law when nothing ostensibly happens—no garnered decisions to enrich the law reports, no Fleet Street fodder, the by-product of the busy mills of justice. "Back in two months" is the note that they might well pin on the front door of the Royal Courts of Justice, only no one can even get near the front door just now. As if to mark the completeness of the closure, an enormous abyss has been opened in the forecourt just outside. Where the great flagstones used to lie, the curious, peering downwards, may glimpse the entrances of vast mysterious tunnels. There, in due course, with all the leisurely grace that characterises the operation of Government enterprises, a new boiler will be lowered to warm the seat of metropolitan justice in the autumn chills, when she begins to draw her ermine more tightly about her. No one can tell whether from this subterranean commotion will spring any unforeseen procedural revolution. That is by no means a *non sequitur*, for in England anything may follow on anything and as often as not does. It was because of a new underground boiler house that the Lords of Appeal stopped hearing the arguments in the appeals in the House of Lords Chamber and invented the Appellate Committee. The peers were still being accommodated in their temporary war-time Chamber in the King's Robing Room, when just beneath the windows a particularly noisy pile-driver started prolonged operations for the accommodation of a complicated new heating apparatus. Legal argument did not blend well with pile-driving, so, for the general good of both Houses, the Law Lords, instead of committing the noisy technicians for contempt, themselves courteously retired to prepared positions elsewhere. Everyone was assured that the expedient was purely temporary, dictated as it was by a temporary emergency. But this arrangement of judicial business was found to be convenient in many respects and, despite reiterated warnings from Lord Simon of the constitutional objections to the new practice, it has quietly entrenched itself in custom and habit and year by year the memory of the old way has faded. All very inconsequential, all very English.

MATRIMONIAL RETROSPECT

WELL, as I said, this being the dead season for lawyers, maybe we can fall back on that old journalistic stand-by, married relations, so retrospectively let us pick up what hints we can on the consequences of domestic fury from last term's cases. If your relations with your spouse's dog are strained, refrain from growling in the face of his inarticulate friend. A wife who did just that found that she had broken her husband's back with what turned out to be the final straw. "You can do what you like to me," exclaimed that true-hearted Englishman, "but you cannot be unkind to the dog. You go to-morrow morning." And off she had to go. Moreover, her husband was granted a divorce on the ground of her cruelty. Then the Court of Appeal gave a warning to good women who cherish the widespread female illusion that their beautiful influence can reclaim not so good men. Such a one, and a very nice looking girl too, waited four years for her man to come out of prison, married him and only a few weeks later saw him go down for another two-years stretch for theft. She thought that this was not only cruel hard but cruelty in law as well. The judge of first instance thought it was, the Court of Appeal disagreed. The decision gave Jenkins, L.J., the opportunity to reassure any husband who may be thinking of walking across Niagara on a tight-rope. "It would cause anxiety to his wife," he said, "but it is not cruelty." But the husbands did not win every round in the Divorce Court. Here was an emotional and self-dramatising wife matched, by the fate which governs that sort of thing, with a completely selfish man, hitherto a confirmed bachelor. "The wife," said the judge, "was an almost impossible woman with whom to live, but that does not excuse the husband in making no attempt of any kind to preserve the peace and in constantly behaving in a way he must have known would enrage his wife." The operative word was evidently "almost," for the wife won her decree on the ground of cruelty. Anyhow, in common sense, the court had somehow or other to bring about a cease fire. Then there was the mutual desertion case where the Court of Appeal found itself unable to hold that the parties had deserted each other. With that preoccupation with guilt peculiar to the English divorce law, it seems that here too there must always be a relatively guilty and a relatively innocent party, a deserter and a desertee. The spouses cannot just fly apart in simultaneous disgust at each other's horrible characteristics. The seasoned principle of the divorce courts that when two people have made a mistake one should go on indefinitely paying for it has been duly maintained, though with variations approximating more closely to those principles of sex equality which in this connection women tend to press less strongly than in others. An ex-wife has been ordered to provide £1,500 a year for her ex-husband, while an ex-husband has been ordered to pay his ex-wife £1 a year in monthly instalments.

FOREIGN AFFAIRS

FOREIGN matrimonial affairs continue to provide slightly more colour than the gentle eccentricities of the English. There was Guilio Ronti, a gentleman of Italian extraction living at Lille in France, who, feeling a yearning to re-visit his native land, sold his wife for the equivalent of about £150 to a friend and fellow countryman Carmelo Martinus. Returning from his journey, he instituted divorce proceedings on the ground of her adultery. In England there would be all the business of collusion, conduct conducing and heaven knows what. In France there was a happy ending all round. Said the lady: "I accepted the deal because Martinus was much more sober, nicer and a better worker than my husband." Carmelo felt that she was well worth the money. Ronti got his divorce at the price of the costs. In Mexico, on the other hand, divorce is perhaps a little too easy. There was the case of the movie star who recently admitted that he divorced his wife there some months ago but went on living with her. "I had planned to tell her," he said, "but never got around to it."

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Leaders' Refreshers

Sir,—May I refer to your paragraph under the above heading on p. 530 of your journal dated 1st August, 1953, and in particular to your quotation from the Evershed Committee's report, viz., as regards solicitors' fees for a long trial: "the Taxing Master will award such a figure as he regards in his experience as a fair and just figure. Better than that—the award of an independent and experienced officer—it seems impossible to expect."

A layman reading the above might fairly assume that the solicitor's trial fee is something like a refresher fee of 25 guineas, whereas it often merely amounts to £1 11s. 6d. or £3 3s. a day, during which time the solicitor is kept away from his office and other important work and under the strain of trying to be certain that the points and documents relevant to his client's case are not overlooked by counsel.

I doubt if the solicitor's trial fees usually allowed are ever "fair and just" in long and important cases.

London, W.C.1. J. F. CHADWICK.

REVIEWS

Maxwell on the Interpretation of Statutes. Tenth Edition. By G. GRANVILLE SHARP, Q.C., B.A., LL.B. (Cantab.), Recorder of King's Lynn, and BRIAN GALPIN, M.A. (Oxon), of the Middle Temple and the Western Circuit, Barrister-at-Law. With a Foreword by SIR HENRY WYNN PARRY. 1953. London: Sweet & Maxwell, Ltd. £2 5s. net.

In their preface to this edition of Maxwell the editors state that in preparing it they have preserved the original format, and, while adding much that is new, have sought to avoid undue enlargement of the volume. This claim is amply justified. The number of pages devoted to the actual text remains exactly the same as in the last edition, but even the most casual glance at almost any page between the first and last shows the addition of new matter and the rearrangement of old. The interpretation of statutes and statutory instruments is, of course, a subject which has never been more important than it is to-day, and an up-to-date edition of this reliable and comprehensive work is an essential in any office or set of chambers where a really general practice is carried on. Since the last edition (1946) the Statutory Instruments Act, 1946, has been passed, and it is useful to have a full note on this Act. The convenience of the present edition, which is very well produced, is also much increased by the addition of a table of statutes, a curious omission in past editions of a work on this subject.

Oyez Practice Notes, No. 29: Solicitors' Costs and Funds in Bankruptcy. By MAURICE SHARE, B.A. Hons. (Oxon), of Gray's Inn and the North-Eastern Circuit, Barrister-at-Law. 1953. London: The Solicitors' Law Stationery Society, Ltd. 10s. 6d. net.

Whether their contact with the law of bankruptcy is frequent or infrequent, solicitors will derive help from this booklet, which deals in a practical manner with every aspect of solicitors' costs in their relation to the insolvency of individuals. After two brief chapters explanatory of the general principles applicable to the vesting of the bankrupt's property and the different kinds of funds, the subject of costs in bankruptcy proceedings is developed logically from the general rules, taxations and scales, through the costs of the petition to costs of reviews and appeals and of the solicitor for the trustee. The latter include the costs of the solicitor for the trustee of a deed of arrangement. There is a separate and particularly valuable chapter on the proof in bankruptcy for solicitors' costs incurred by the debtor in matters other than the bankruptcy proceedings themselves. Two appendices contain respectively the scales of costs and five very useful precedents of bills of costs.

May we express the hope that the publishers might add to the series a similar booklet concerning costs in companies' winding-up proceedings?

Notable British Trials Series, Volume 78: The Trial of John George Haigh. Edited by LORD DUNBOYNE, of the Middle Temple, Barrister-at-Law. 1953. London, Edinburgh, Glasgow: William Hodge & Co., Ltd. 15s. net.

It was with altogether unusual horror that in 1949 the public learnt of the circumstances of the murder of Mrs. Olive Durand-Deacon and the manner of the disposal of her body, so that the trial and conviction of John George Haigh are likely to retain their vividness indefinitely in the gruesome memory of "the acid bath case." In that sense it is certainly notable and it is well that the text of the trial and the relevant documents should be readily available. Lord Dunboyne, the editor of this volume, has written a lucid introduction, summarising the facts and the legal proceedings. He deals particularly well with Haigh's attempt to build up a fictitious defence of insanity by a suggestion that the killing of his previous victims had for motive a craving to drink their blood. Despite its unusual circumstances, the case was as squalid as it was horrible.

TALKING "SHOP"

August, 1953.

It is, in my experience, a commonplace of legal practice that one has only to advise a client that the law is *x*, to read (say) in the *Solicitors' Journal* next day that it has been held at first instance to be *y*. This may be termed *York's Law* after that gallant officer who marched his troops to the top of a hill and down again.

The gremlin of *York's Law* also gets into this Diary. Thus, some two months ago I selected for comment in August the subject of capital advances for education—a subject of some practical interest but seemingly dormant at the time. Meanwhile, as will appear from the answer given to a correspondent at 97 SOL. J. 511, and the ensuing correspondence published in these columns, it has woken up with a start. It follows that the ensuing text has undeservedly become both topical and factious, but as readers may like to note some views formed, as it were, *a priori*, I have left it unchanged.

TUESDAY, 4TH

Would it be true to say that the once sharp distinction between maintenance and advancement is becoming a little blurred? A great deal, of course, depends upon what one means by those terms; I am using them in the widest sense to mean payments or applications of income under s. 31 and of capital under s. 32, Trustee Act, 1925.

If the two sections be compared, it will be found that s. 31 authorises trustees to pay or apply income for or towards the maintenance, education *or benefit* of infant beneficiaries as therein mentioned; and s. 32 authorises trustees to pay or apply capital money for the advancement *or benefit* of any person entitled to capital money, whether absolutely or contingently as therein mentioned. Both sections are familiar to conveyancers, so I will not take up any space here in discussing the limits placed upon their operation or the conditions that must be fulfilled before they can be invoked; I will assume that the trust is one to which both sections *prima facie* apply and that the trustees will take care to observe in relation to maintenance the proviso to subs. (1) of s. 31, and in relation to advancement the three provisos to subs. (2) of s. 32.

Now I have heard it suggested more than once, and in relation to clients of widely different means, that it is permissible for trustees to supply the whole cost of educating a child from trust capital in reliance upon the word "benefit" in s. 32. Indeed, in one case there was a kind of parental innuendo that the trustees would be sadly culpable if they did *not* avail themselves of their presumed powers under that section, which only goes to show that the habit of living upon capital soon develops into a state of mind.

As with most problems in the family trust field to-day, the motive force is supplied by taxation and death duties, but what served for a while to aggravate the problem here was a popular scheme for the payment of school fees in advance under discount, introduced some years ago and since adopted by many public and other schools. This gave rise to a notion on the part of parental life-tenants which, so far as I can capture its elusive nature, may be thus expressed: here is a very large bill from Eton (or whatever the school might be); obviously too large for me to pay from taxed income so it must be paid from capital; it is also obvious

(is it not ?) that it is to Willy's advantage to have his school fees paid for the next five years, to say nothing of the discount and being educated at Eton . . .

WEDNESDAY, 5TH

I am very far from suggesting that trustees cannot, in any circumstances, apply capital money for educational purposes under s. 32, but then everything depends upon the circumstances. Perhaps I should substitute "relevant circumstances" because the relevance of the school fees composition scheme has always escaped me. It may suit parent *A* to make a composition payment, but parent *B* may choose, or lacking capital be obliged, to face school bills thrice annually with the school reports. I cannot myself discern any principle upon which *A* should be made happy under s. 32 when *B* is not, because the quality of the payment and its purpose remain just the same whether the sums happen to be disbursed by composition or by instalments.

Whether the school fees composition scheme be relevant or not, we are left with the core of the problem: when is it permissible for trustees to advance capital under s. 32 for educational purposes? "Advancement" is a term of art, implying "some permanent benefit or advantage in life for the person advanced" (Lewin on Trusts, 15th ed., p. 317), and in most of the books on this subject one can find a compendium of cases illustrating this principle (see, e.g., the same at p. 318, footnote (*o*)). And the word "benefit," used in conjunction with "advancement" (as it is in s. 32), is to be construed in its natural sense, not *ejusdem generis* with advancement; see *Lowther* v. *Bentinck* (1874), L.R. 19 Eq. 166, which came very near to the full stretch of the word "benefit" (payment of the advanced person's debts) and is a useful prop for doubtful cases. And finally (*op. cit.* at p. 317) the term "advancement" is properly referable to an early period of life but is not confined to infancy.

THURSDAY, 6TH

There is in fact some authority to show that it may be for the "benefit" of a person to apply capital for his or her maintenance. Thus in *Re Breeds' Will* (1875), 1 Ch. D. 226, the testator empowered his trustees to apply any sum or sums not exceeding one-fourth of the capital of the presumptive share of any child of his "in or towards the placing out or advancement in life or otherwise for the benefit of such child . . ." The will contained no provision for the maintenance of unmarried daughters of the testator between the ages of 21 and 25 and the power of maintenance conferred by Lord Cranworth's Act (23 and 24 Vict. c. 145) stopped short at 21 (cf. now s. 31 (1) (ii), Trustee Act, 1925). Jessel, M.R., who had previously decided *Lowther* v. *Bentinck*, *supra*, held that with the consent of the widow the trustees could allow maintenance out of capital under the advancement clause.

The *Breeds* case is very briefly reported and it is difficult to judge whether the learned Master of the Rolls found it necessary to weigh up the family fortunes, as it were, in coming to his decision. I think it fair to assume that he did. It may therefore be worth noting what income was available for the support of the family. It was a case where the testator left a residuary estate valued at about £100,000, an annuity to his widow of £500 during widowhood, and nine children—three sons and six daughters. In addition to the £500 annuity the widow was to receive maintenance allowances for the children on the scale of (*a*) £80 per annum for each child under 10, and (*b*) £100 per annum for each child aged 10 to 21. (An interesting commentary, this, upon mid-Victorian cost of offspring.) In fact, only six children were infants at the date of death and of these all were over 10 years of age, so the widow's income was £500 + (6 × £100) = £1,100 per annum; the residue as a whole was estimated to yield £2,400 per annum.

Re Garrett; Croft v. *Ruck* [1934] Ch. 477 comes very close to the present problem, for it concerned a proposal to pay school fees and other expenses under s. 32. But the argument was mostly devoted to a question of construction, viz., whether the words "other event" in s. 32 include a compound or double event. The question was mooted whether such an advance would be for the benefit of the plaintiff (a life tenant restrained from anticipation) but it seems to have been assumed that it was for the benefit of the infant. The report does not mention the size of the fund. By and large, *In re Garrett* shies away from the problem in rather a disappointing way but, inasmuch as it was not (it seems) objected that the infant would be prejudiced by the advance, it is at least consistent with the view that *prima facie* it is for the benefit of an infant to pay school fees from capital.

FRIDAY, 7TH

The crux of the problem, then, is whether or not it is really for the benefit of an infant that his inheritance, or a part of it, should be expended upon his education, and I think it would be wrong to conclude that *Re Breeds* is conclusive of this point; I doubt if it does more than establish the proposition that expenditure upon maintenance—and, by parity, education—*may* be a benefit; equally, it may not.

At this point we come to another comparison between the two sections: whilst under s. 31 trustees (unless relieved by the trust instrument) must have regard, *inter alia*, to other sources of income, there is no parallel provision in s. 32 (e.g., to the effect that in advancing capital, trustees must have regard to other sources from which such expenditure might be met). None the less, trustees would not be well advised to disregard other available resources, for it is difficult to see how, in normal circumstances, it can be beneficial to an infant to be educated at his own expense instead of, let us say, his father's. The question, then, is not whether education is beneficial, but *whether expenditure which could or would be provided from another source is beneficial.*

This really brings us to the point that in exercising—or refraining from the exercise of—the statutory power of advancement trustees must have regard to the financial circumstances of the parent. A kind of "means test," and from my experience, however obvious this conclusion may be, it is far from easy to apply the test in practice.

I will leave the subject on an interrogatory note. Let us assume then that *A* is a trustee of a fund, value, say £500,000, in trust for *X* for life (gross income from this and other sources, say £30,000 per annum) with remainder to *X's* five children in equal shares at 21. The trust is one to which ss. 31 and 32 both apply. Despite his large, but also largely sur-taxed income, *X* says in effect: you can send Willy to Eton and Milly to Roedean and the other children likewise if you please, but in default of aid from the trust fund, all five of them will go at my expense to a very excellent council school.

Without drawing any invidious comparisons between different systems of education, if *A* for reasons best known to himself should suppose that Willy and Milly and the other three would profit more from a public school education, what is he to say to *X*? *X* seems to be well within his parental and legal rights in choosing a council school. Perhaps trustees should apply not only a "means test" but a test of willingness on the part of a parent to submit to it.

"ESCROW"

The Lord Chancellor has appointed Mr. RICHARD GEOFFREY GREENE, Mr. PERCY JOHN CORCORAN and Mr. NEIL BALLINGALL BIRRELL to be Deputy Judge Advocates.

Mr. HUGH COLLEY IRVINE, solicitor, of Manchester, has been made a director of John Summers & Sons, Hawarden Bridge Steelworks.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

COURT OF APPEAL

NEGLIGENCE: AGENCY: CAR DRIVEN BY FRIEND TO PICK UP DRIVER

Ormrod *v.* Crosville Motor Services, Ltd.; Murphie, third party

Singleton, Denning and Morris, L.JJ.

9th July, 1953

Appeal from Devlin, J., sitting at Chester Assizes.

The first plaintiff was driving a car in which his wife, the second plaintiff, was a passenger, from Birkenhead to Monte Carlo, at the request of the third party, the owner of the car, who was at the time driving another car in the Monte Carlo rally. It had been agreed that after the rally all three parties should spend a holiday in Switzerland in the car driven by the first plaintiff. It was also agreed that on the way to Monte Carlo the plaintiffs should visit friends at Bayeux, in Normandy, and they accordingly started a few days earlier than they would otherwise have done. Soon after leaving, the plaintiffs' car came into collision with an omnibus belonging to the defendants and driven by their servant. Both the plaintiffs were injured and both vehicles were damaged. The plaintiffs brought an action for negligence and the first defendants counter-claimed for damage to their omnibus, alleging negligence against the first plaintiff. They also took third-party proceedings against the owner of the car on the ground that he was vicariously liable for the first plaintiff's negligence. The third party counter-claimed for the damage done to his car. Devlin, J., held that the accident was due to the negligent driving of the first plaintiff and that the third party had such an interest in the arrival of the car at Monte Carlo as to create an agency on his behalf in the first plaintiff, for whose negligence the third party was accordingly liable. He therefore gave judgment for the defendants against the third party, who appealed. Other questions were raised on the appeal, but that in relation to the owner's vicarious responsibility for the negligence of the first plaintiff is the only one calling for a report. The court affirmed the decision of Devlin, J., that the third party was vicariously responsible for any negligence on the part of the first plaintiff.

SINGLETON, L.J., said that in his opinion the appeal of the third party failed. It had been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become his agent. The mere fact of consent by the owner to the use of a chattel was not proof of agency. The purpose for which the car was being taken down the road on the morning of the accident was either that the car should be used by the owner or that it should be used for the joint purposes of the owner and the plaintiffs when it reached Monte Carlo. In those circumstances the finding of Devlin, J., that at the time of the accident the first plaintiff was the agent of the third party was right and his appeal should be dismissed.

DENNING, L.J., agreed. The law put an especial responsibility on the owner of a vehicle who allowed it out on the road in charge of someone else, no matter whether it was his servant, his friend or anyone else. If it was being partly or wholly used on the owner's business, or for the owner's purposes, then the owner was liable for any negligence on the part of the driver. The owner only escaped liability when he lent or hired it out to a third person to be used for a purpose in which the owner had no interest or concern. That was not the present case. The trip to Monte Carlo must be considered as a whole, including the proposed excursion to Normandy. It was undertaken with the owner's consent for the purposes both of the owner and the driver, and the owner was liable for any negligence of the driver in the course of it.

MORRIS, L.J., agreed. Appeal by third party dismissed.

APPEARANCES: *Rose Heilbron*, Q.C., and *Emlyn Hoosen* (*Field, Roscoe & Co.*, for *Berkson & Berkson*, Birkenhead); *Christopher Shawcross*, Q.C., *W. L. Mars-Jones* and *E. Lewis* (*Stanley & Co.*, for *A. W. Mawer & Co.*, Liverpool); *S. Scholefield Allen*, Q.C., and *R. G. Clover* (*Jaques & Co.*, for *Dodds, Ashcroft and Cook*, Liverpool).

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law] **[1 W.L.R. 1120**

PRACTICE: WRIT SERVED MORE THAN TWELVE MONTHS AFTER ISSUE: EFFECT OF UNCONDITIONAL APPEARANCE

Sheldon *v.* Brown Bayley's Steel Works, Ltd., and Dawnays, Ltd.

Singleton and Denning, L.JJ. 22nd July, 1953

Interlocutory appeal from Barry, J. ([1953] 1 W.L.R. 875; *ante*, p. 474).

By R.S.C., Ord. 8, r. 1: "No original writ of summons shall be in force for more than twelve months from the date thereof . . . but if any defendant shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge to renew the writ; and the court or a judge . . . for good reasons, may order that the original writ of summons be renewed for six months . . ." By Ord. 70, r. 1: "Non-compliance with any of these rules . . . shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside as irregular." In proceedings for damages for a fatal accident brought by the widow of a deceased workman under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, the writ was not served on the defendants until after twelve months. The second defendants entered an unconditional appearance, but later took out a summons to have the writ set aside. The master set aside the writ and his decision was affirmed by Barry, J., on the ground that a writ, if not served within twelve months, was a nullity and ineffectual for all purposes.

SINGLETON, L.J., said that it had been held over a long period of years that Ord. 8, r. 1, enabled the court to renew a writ, even though the application was not made until after the expiration of twelve months, but the court would not normally exercise its discretion in favour of renewing a writ after the period of service had expired if the effect of doing so would be to deprive a defendant of the benefit of a limitation which had accrued. In the present case, if the order of Barry, J., was right the second defendants were free, because it would be too late to issue another writ having regard to the terms of s. 3 of the Fatal Accidents Act, 1846. In *Battersby and Others* v. *Anglo-American Oil Co., Ltd., and Others* [1945] K.B. 23, Goddard, L.J., referred to a writ which was not served within the prescribed period as having become a nullity and the position as being the same as if it had never been issued. He (Singleton, L.J.) did not regard it as accurate to say that a writ which had not been served within twelve months was a nullity. It was something which could be renewed, which a nullity could not. The position under Ord. 8, r. 1, was that the writ was not in force for the purpose of service but it was still a writ. The unconditional appearance entered by the second defendants was a step in the action; it amounted to a waiver of the irregularity in the service and prevented them from successfully contending that the service on them was bad.

DENNING, L.J., agreed that the service of the writ after twelve months was not a nullity but an irregularity which was waived by the unconditional appearance.

Appeal allowed.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *D. P. Croom-Johnson* (*W. H. Thompson*); *Neil Lawson* (*Kenneth Brown, Baker, Baker*, for *Gee & Edwards*, Swansea.)

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law] **[3 W.L.R. 542**

APPLICATION TO COURT FOR ADMINISTRATIVE DIRECTIONS: DUTY TO MAKE AVAILABLE ALL MATERIAL INFORMATION

***In re* Herwin; Herwin *v.* Herwin**

Evershed, M.R., Birkett and Romer, L.JJ.

17th July, 1953

Appeal from Vaisey, J.

A testator, W. R. Herwin, who died in 1950, by his will directed his trustees to hold his residuary estate, subject to the payment of an annuity to his second wife, Annie Dorothea Herwin, upon trust "for such of them my children or child (if only one) living at my death who shall attain the age of twenty-one years . . ."

Administration with the will annexed was granted to the plaintiffs, Annie Dorothea Herwin and Alec John Herwin. The testator had had no legitimate children. He had had three children by his second wife, Annie Dorothea Herwin, who were born during the subsistence of his first marriage. The plaintiffs took out a summons asking whether the gift to " children " took effect in favour of the three children. The only evidence filed was an affidavit of Alec John Herwin, which gave no evidence as to the testator's health. The defendants filed no evidence. Vaisey, J., held that, having regard to the authorities, he was unable to conclude as a matter of construction that the testator intended to include illegitimate children. The testator might have hoped that his wife would have a legitimate child. He accordingly held that the gift to the children failed. The children appealed. They applied by motion for leave to call fresh evidence; such evidence, being that of the testator's widow and of his doctor, was directed to establishing that the testator was, and knew that he was, when he made his will, impotent and incapable of having further children.

EVERSHED, M.R., referred to the principles stated in *Braddock* v. *Tillotson's Newspapers, Ltd.* [1950] 1 K.B. 47 as to the admissibility of fresh evidence and said that, as in *In re Wohlgemuth* [1949] Ch. 12, the evidence which it was sought to adduce would have had a strong influence on the conclusion in the court below. It was, however, also necessary to establish that the evidence could not with reasonable diligence have been discovered at the date of the trial, and if this had been hostile litigation in which the children were suing the executors, it might well be that their failure to bring this evidence to the attention of the court would have been fatal to their case. These proceedings, however, were by way of originating summons by the personal representatives of a deceased person asking for the directions of the court in the administration of the estate. It was the clear duty of personal representatives or trustees when applying to a judge in the Chancery Division for administrative directions to lay before the court all relative facts which were within their knowledge, and it might well be that if it came to their knowledge after the hearing in the first court that other facts should have been brought to the attention of the court, it would be the duty of the personal representatives to bring those facts either before the Court of Appeal or upon some future application in the administration proceedings. The beneficiaries, who were made defendants to the summons, were entitled to assume that all the facts material for the judge's consideration on the question brought before him would be presented to the court by the plaintiffs. Having regard to that procedural rule, the children were entitled to assume that, if there had been any evidence with regard to the impotence of the testator, a matter within the knowledge of the widow, who was one of the plaintiffs, she would have informed the court of it. In the circumstances, the children, one of whom was an infant, could not reasonably be expected to have interrogated the widow as to their deceased father's sexual capacity. The evidence could not reasonably have been obtained before the hearing and accordingly was admissible. It was conclusive as to the testator's intentions and the gift in favour of the children took effect.

BIRKETT and ROMER, L.JJ., agreed. Appeal and application allowed.

APPEARANCES: *J. A. Armstrong* (*Wilkinson, Howlett and Moorhouse*); *K. W. Rubin* (*H. E. Thomas & Co.*); *A. A. Spears* (*Clutton, Moore & Lavington*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 530

RENT RESTRICTION: "LANDLORD BY PURCHASING"

Emberson *v.* Robinson

Somervell, Jenkins and Hodson, L.JJ. 23rd July, 1953

Appeal from Ilford County Court.

For the purposes of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court shall, by Sched. I to that Act, give judgment for the recovery of possession of a dwelling-house to which the Rent Restrictions Acts apply without proof of alternative accommodation where the court considers it reasonable so to do, if " (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after 1st September, 1939), for occupation as a residence for (i) himself . . ." In June, 1939, the plaintiff entered into an agreement with the then owners of a newly built dwelling-house to purchase the house. He signed as purchaser, and paid a deposit. Shortly afterwards he was called up for war service, and was not demobilised until 1945, when he completed the purchase, paying the balance of the purchase price. In the interval, the vendors had let the premises to the defendant, from whom the plaintiff in the present action claimed possession. The defendant contended that the plaintiff had become landlord by purchase after 1st September, 1939, and was therefore not entitled to possession without proof of alternative accommodation. The county court judge granted an order for possession to the landlord. The tenant appealed.

SOMERVELL, L.J., said that the tenant had raised two questions: first, was the completion in 1945 a completion of the contract of June, 1939, or was it a new contract; and, second, whether the landlord purchased in 1939, the date of the agreement, or in 1945, the date of completion. If a contract had been made before 1st September, 1939, and had been completed after normal proceedings after that date, the relevant date on which the purchaser became a landlord by purchase would have been the day when the contract was signed, a conclusion supported by *Barratt* v. *Marshall*, 54 Ir. L.T. 214. The question was whether the circumstances of the present case led to a different conclusion, and that led to a consideration of the tenant's first question. Two points had been raised: first, the original contract was for vacant possession; and, second, that the vendor had let the house behind the purchaser's back; but the proper conclusion was that the completion in 1945 was completion of the contract of 1939. The delay in completion was due to the war; the purchaser might have been killed; he did not tender the purchase price within a reasonable time, but the vendor was content for the matter to remain open and did not seek to repudiate. When the parties came together in 1945, the purchaser waived his right to demand vacant possession, and the judge below had taken the right view that, for the purposes of the Act, completion was that of the original contract, so that the landlord should not be considered as having become such by purchase after 1st September, 1939.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *P. A. W. Merriton* (*Gedge, Fiske & Co.*, for *Mullis & Peake*, Romford); *A. E. Holdsworth* (*G. Houghton & Son*, Romford).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1129

EJECTMENT: WHETHER ACTION BARRED BY ELECTION IN COUNTY COURT

Rosenfeld *v.* Newman and Others

Evershed, M.R., Birkett and Morris, L.JJ. 29th July, 1953

Appeal from Parker, J. ([1953] 1 W.L.R. 558; *ante*, p. 230).

The owner of a dwelling-house occupied by the defendants brought proceedings for possession in the county court on the ground of trespass and, by amendment to the particulars of claim, on the alternative ground that if, contrary to his contention, the defendants were protected by the Rent Acts, the house had been sub-let or assigned to them by the original tenant without his consent. The annual value of the house exceeded £100 and the defendants objected that the county court judge had no jurisdiction so far as the claim of trespass was concerned. The plaintiff thereupon elected to proceed on the alternative ground, and the county court judge said that, "owing to lack of jurisdiction I am compelled to hold that the plaintiff's claim fails as there is no evidence that the defendants are contractual or statutory tenants." In proceedings for possession on the ground of trespass brought by the plaintiff in the High Court, in which each party contended that the county court proceedings and findings raised an estoppel against the other, Parker, J., held that, the plaintiff having elected to proceed in the county court on his alternative claim that the defendants were tenants, it was not open to him in the High Court to prove that they were trespassers, and the plaintiff was estopped from asserting his claim. Parker, J., found, as a fact, that the defendants had never been tenants. The plaintiff appealed.

EVERSHED, M.R., said that, on the true construction of the plaintiff's amended particulars of claim and having regard to the course of the proceedings and to the decision of the county court judge, the plaintiff had not in fact abandoned his claim in trespass, nor had he finally elected to treat the defendants as tenants; accordingly, he was not estopped from proceeding in the High Court for possession and he was entitled to an order for possession.

BIRKETT and MORRIS, L.JJ., agreed. Appeal allowed.

APPEARANCES: *Khambatta*, Q.C., *S. W. Magnus* and *P. A. W. Merriton* (*Bennett, Hobson & Co.*); *H. T. Buckee* (*Breeze, Benton & Co.*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 1135

Chantrey, Martin & Co. *v.* Martin

It is regretted that in our report of the above appeal, at p. 539, *ante*, certain allegations made by the defendant against Messrs. Chantrey, Martin & Co., Chartered Accountants, of Southampton Place, Bloomsbury Square, W.C., were stated in a way which did not make it clear that they were only the defendant's case against them. All those allegations were and are denied by Messrs. Chantrey, Martin & Co.; the hearing reported was concerned purely with a point of law, and the court made no finding suggesting any impropriety or irregularity whatever on the part of Messrs. Chantrey, Martin & Co.

CHANCERY DIVISION

SETTLEMENT: PURCHASE BY APPOINTOR OF CHILDREN'S APPOINTED SHARES: VALIDITY

***In re* Merton; Public Trustee *v.* Wilson**

Wynn Parry, J. 4th June, 1953

Adjourned summons.

Under the provisions of a settlement the income of the trust funds, after the death of the tenant for life, was to be held in trust for such of her issue as should attain twenty-one or marry as she might by deed or will appoint, and in default of appointment in trust in equal shares for all her sons who should attain twenty-one, and daughters who should attain that age or marry. There were three children, all of whom attained twenty-one. In 1940 one child, a son, became of unsound mind. The tenant for life had made generous provision for him, and thought that it would be useless to make further provision for him out of the settled funds; she accordingly by a will made in 1940 appointed the whole of the interest in the trust fund to her two daughters equally, and repeated this provision in a will made in 1948. Being advised that it would be to her daughters' advantage to do so, she executed a deed of appointment in 1952 to the like intent, subject to her life interest. Being further advised that by doing so she could confer a further substantial benefit on her daughters, in the way of reduced estate duty, she purchased from them the entire reversionary interest in the capital of the settled funds for a sum substantially above that at which it had been professionally valued. Doubt having arisen whether under the circumstances the appointor was competent to acquire more than the two-thirds share to which the daughters were entitled in default of appointment, a summons was taken out to ascertain whether she had acquired a two-thirds interest or the whole interest in the settled funds.

WYNN PARRY, J., said that the purpose and result of the transaction was a substantial benefit to the daughters. The transaction could only be invalid, and then only partially, if it could be shown that there was an inflexible rule that, where appointor and appointee were parent and child, an appointor who purchased the child's appointed interest could not benefit thereby beyond the child's interest in default of appointment. It appeared from *Vatcher* v. *Paull* [1915] A.C. 372 and *In re Dick* [1953] 2 W.L.R. 477 that in such a case it was the duty of the court to inquire into the purpose and intention of the appointor, and if it appeared that his purpose was to benefit himself or some person not an object of the power, the transaction was invalid. *Noel* v. *Lord Walsingham* (1824), 2 Sim. & St. 99, was quite inconsistent with any settled rule invalidating all such transactions; and even if *Smith* v. *Lord Camelford* (1795), 2 Ves. 698, could be interpreted to the contrary, it would have to give way to the overriding authority of Lord Parker in *Vatcher* v. *Paull*, *supra*. Here the intention of the appointor was clearly to benefit her daughters; the transaction was wholly valid, so that the appointor was entitled to the whole of the capital of the settled funds. Declaration accordingly.

APPEARANCES: *Hubert Rose*; *B. L. Bathurst*, Q.C., and *N.C. Armitage*; *W. F. Waite*; *W. J. C. Tonge*; (*Park Nelson & Co.*); (*Bischoff & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1096

SETTLEMENT: PORTIONS: SATISFACTION

***In re* Livesey; Livesey *v.* Livesey**

Roxburgh, J. 17th July, 1953

Adjourned summons.

The terms of a settlement provided that if the settlor "shall give . . . to any child or children for whom a portion is . . . intended to be hereby provided . . . any sum or sums of money on his her or their marriage or for the payment of his her or their debts or otherwise for his her or their advancement then . . . such sum or sums of money shall be taken in substitution (*pro tanto* . . .) for the portion or respective portions . . . and such amount only . . . shall be appropriated . . . as together with the amount of such advancement will . . . complete the portion . . . and the remainder . . . shall sink into the estate for the benefit of the inheritance . . ." The settlor had three sons. By his will he gave to his younger son *A*, *inter alia*, certain mortgage investments, and to his younger son *E*, *inter alia*, a mortgage for £30,000. On the settlor's death, his eldest son took out a summons to ascertain whether these gifts had to be taken into account.

ROXBURGH, J., said that it seemed right to say that the mortgage investments and the mortgage were "sums of money given" to *A* and *E*; apart from authority, the language of the settlement seemed inapplicable to testamentary gifts, but the course of authority was such that it must be held to be applicable. As to intention, the gifts under consideration were coupled in the will with gifts plainly falling outside the definition, and must be regarded as mere testamentary bounty. It was contended for the plaintiff, first, that even mere bounty must be brought into account, and secondly, that a sum, if "substantial," must be presumed to be an advancement in the absence of evidence. The plaintiff relied on *Onslow* v. *Michell* (1812), 18 Ves. 490, but that case did not assist in the construction of the present settlement, beyond showing that a testamentary gift could be applicable. But *Lowther* v. *Bentinck* (1874), L.R. 19 Eq. 166, showed that words relating to advancement were much narrower than mere bounty, so that the plaintiff's first argument failed. The second argument, that large sums must be presumed to be advancements, had no authority to support it, and was not acceptable. It was a question of fact, and the plaintiff had produced no evidence to support such an inference. The younger sons, therefore, were not accountable in respect of the gifts. Declaration accordingly.

APPEARANCES: *G. Cross*, Q.C., and *R. Gwyn Rees* (*Royds, Rawstorne & Co.*); *Sir L. Ungoed-Thomas*, Q.C., and *T. A. C. Burgess* (*Waterhouse & Co.*, for *Watson, Esam, Barber & Brayshaw*, Sheffield).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1114

DAMAGES: SOLICITOR: NEGLIGENCE: MEASURE OF DAMAGE

Pilkington *v.* Wood

Harman, J. 21st July, 1953

Action.

In 1950 the plaintiff purchased freehold property in Hampshire; he had employed the defendant to act as solicitor in the transaction, and the vendor had purported to convey the property as beneficial owner. When the plaintiff attempted to sell the property in 1951, having changed his place of employment from Surrey to Lancashire, he found that the title was defective, since the vendor was a trustee of the property and had committed a breach of trust in purchasing it himself. Negligence by the defendant was admitted, and the only issue remaining was as to the quantum of damage. The plaintiff claimed, in addition to general damages for the difference in value of the property with a good title and its value with the defective title, special damage in respect of the following items: (*a*) the expenses in connection with his new employment, namely, hotel expenses for temporary accommodation in Lancashire, cost of running a car between Hampshire and Lancashire and telephone calls every night to his wife while in Lancashire; (*b*) cost of the valuation of the property required by his bankers at the time of the purchase, and (*c*) interest on the overdraft which remained because he was unable to sell the property. The defendant contended that the plaintiff should, before bringing this action, have mitigated his damage by suing the vendor on the implied covenant for title under s. 76 of and Sched. II to the Law of Property Act, 1925, since the vendor had purported to convey as beneficial owner; alternatively, that the plaintiff should have taken out a policy of insurance against the consequences of the defect in the title.

HARMAN, J., said that the duty to mitigate did not extend to obliging the plaintiff to sue under the covenant for title, it being no part of the plaintiff's duty to embark on such litigation in order to protect the defendant from the consequences of his own carelessness. No satisfactory evidence had been adduced that any policy of insurance to cover such a defect could be

obtained. The proper amount of damage was the difference between the market value of the property at the time of the breach in 1950 with a good title and the market value it would have then had with a defective title. None of the items of special damage was recoverable; they did not fall within the second rule of *Hadley* v. *Baxendale* (1854), 9 Exch. 347*n*, since none of them could have been within the reasonable contemplation of the parties at the date of purchase of the property in 1950. Judgment for the plaintiff.

APPEARANCES: *Charles Russell*, Q.C., and *R. Cozens-Hardy Horne* (*Norton, Rose, Greenwell & Co.*); *J. Pennycuick*, Q.C., and *E. I. Goulding* (*William Charles Crocker*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[3 W.L.R. 522**

INCOME TAX: ARMY OFFICER: DEDUCTIONS FOR EXPENSES

Lomax (Inspector of Taxes) *v.* Newton

Griffiths (Inspector of Taxes) *v.* Mockler

Vaisey, J. 21st July, 1953

Appeals from decisions of the Commissioners for the General Purposes of the Income Tax Acts.

The respondent in the first appeal was an officer in the territorial army; he claimed that the following expenses should be allowed as deductions for the purpose of computing his income tax on the ground that they were incurred "wholly, exclusively and necessarily" in the performance of his duties as an officer within the meaning of r. 9 of Sched. E to the Income Tax Act, 1918: (1) annual mess subscription; (2) share of mess guests' expenditure; (3) payments to batman at week-end and annual camps; (4) hire of camp furniture; (5) amounts paid for hotel accommodation at conferences and exercises in excess of detention and ration allowances; (6) cost of tickets at sergeants' and other ranks' dances, sergeants' annual dinner club, etc. The respondent in the second appeal was an officer in the regular army; he claimed a similar deduction under r. 9 in respect of his annual mess subscription. Under the King's Regulations in force at the material time, every officer had to be a member of his regimental mess. The Commissioners had allowed all the items as deductions under r. 9, and the Crown appealed from their decisions.

VAISEY, J., said that the words of r. 9 were notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule, it had to be shown that the expense incurred was not only necessarily, but wholly and exclusively, incurred in the performance of the relevant official duties. Compliance with each and every of the words was obligatory if the benefit of the rule was to be claimed, and with the exception of the hotel expenditure there was not sufficient evidence to support the Commissioners' findings that these expenses were within r. 9, and the appeals, subject to that exception, should be allowed. The item in respect of hotel expenditure was rightly allowed. *Nolder* v. *Walters* (1930), 46 T.L.R. 397, where an aeroplane pilot was allowed, as a deduction under Sched. E, the excess of his actual subsistence expenses when away from home on duty over subsistence allowance granted by his employers, came rather near the present case. He thought that he should not disturb a finding of fact which was a possible finding both as to quantum and otherwise, but as a precedent in other cases such expenses should only be allowed in respect of necessaries and not extend to "extras" involving extravagance or personal indulgence. Appeals allowed except as to hotel bills of the first respondent, and cases remitted for adjustment.

APPEARANCES: *Sir Reginald Manningham-Buller*, Q.C., S.-G., and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *John Senter*, Q.C., and *Hilary Magnus* (for the respondent to the first appeal) (*Ellis, Piers & Co.*, for *Pye-Smith & Son*, Sheffield). The respondent to the second appeal was not represented and did not appear.

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 1123**

INCOME TAX: VALUE ATTRIBUTABLE TO HORSES TRANSFERRED FROM STUD FARM TO RACING STABLES

Sharkey (Inspector of Taxes) *v.* Wernher

Vaisey, J. 24th July, 1953

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent's wife carried on the activities of a stud farm, which were admitted to be taxable under Sched. D as "farming" activities. She also carried on separately racing stables which were recreational and non-taxable, and for which she bred horses at her stud farm. In the relevant year of assessment five horses were transferred from the stud farm to the racing stables; and the question on this appeal was the value to be credited in the stud farm accounts in respect of the transferred horses. The Commissioners held that the cost of breeding was the correct figure, and accordingly discharged the assessment on the estimated market value of the horses. The Crown appealed from that decision.

VAISEY, J., said that this case was indistinguishable from *Watson Bros.* v. *Hornby* (1942), 24 T.C. 506; and the amount to be credited in the stud farm accounts on the transfer of the horses was their market value on an assumed notional sale. The general principle that a person could not trade with himself or make a profit out of himself was unexceptionable in itself, but the Income Tax Act, by splitting the personality of the taxpayer into two parts, and putting the two parts into different Schedules, had made some invasion of that principle inevitable. Appeal allowed and remitted to the Commissioners for adjustment.

APPEARANCES: *Sir Reginald Manningham-Buller*, Q.C., S.-G., and *Sir Reginald Hills* (*Baylis, Pearce & Co.*, for *Stevens & Bolton*, Farnham); *Frederick Grant*, Q.C., *John Senter*, Q.C., and *Peter Rowland* (*Solicitor of Inland Revenue*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[3 W.L.R. 549**

INCOME TAX: ADDITIONAL ASSESSMENTS: DISCOVERY

Beatty (Earl) *v.* Inland Revenue Commissioners

Vaisey, J. 24th July, 1953

Case stated by Special Commissioners.

Section 125 of the Income Tax Act, 1918 (now s. 41 of the Income Tax Act, 1952), provides that "If the surveyor discovers —that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable to tax . . . has not delivered a full and proper statement . . . or has been undercharged in the first assessment . . ." there may be an annulment of the assessments or additional assessments. Additional assessments were made on the appellant, Earl Beatty, for 1939–40 and subsequent years for income tax and sur-tax in respect of the income of a Canadian company. The validity of these assessments was challenged by the taxpayer before the Special Commissioners, who confirmed them. The taxpayer appealed.

VAISEY, J., said that it had been contended for the Crown that the assessments under appeal were not made under s. 125 of the Act of 1918, but under s. 18 of the Finance Act, 1936; that contention seemed to be well founded and, if so, that was an end of the case; but as almost the whole of the argument was based on the question of s. 125 he would assume that that section applied, though it could have nothing to do with sur-tax. The Crown submitted that, before the making of the assessments in the relevant years, the Commissioners had "discovered" that profits chargeable to tax had been omitted from the first assessments, so that the assessments were properly made in principle under the sections. What had happened was that the relevant facts had been disclosed by the taxpayer, but their relevance had not been appreciated by the Commissioners; the question was whether the Commissioners could be said to have "discovered" something which they did not understand. There was an analogy in the case of a man who found a diamond on his land and at first thought it was only glass; in the proper sense of the word he "discovered" the diamond on the day on which he found it. To satisfy the section, "discovery" need not be complete, detailed or accurate; when the Commissioners found out the existence of some omission or error, it was not necessary for them to have probed the matter to its depths or to define precisely the ground on which they made the additional assessments. The taxpayer had admitted that the Commissioners knew the facts which justified the additional assessments before they were made. His contention as to "discovery" was a pure technicality, and failed. Appeal dismissed.

APPEARANCES: *L. C. Graham-Dixon*, Q.C., and *H. Magnus* (*Withers & Co.*); *J. Senter*, Q.C., *J. H. Stamp* and *Sir R. P. Hills* (*Solicitor of Inland Revenue*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1090**

GIFT TO NAMED HOSPITAL FOR PARTICULAR PURPOSE: EFFECT OF NATIONALISATION

***In re* Little, deceased**

Vaisey, J. 28th July, 1953

Adjourned summons.

The testatrix gave her residuary estate on trust to "the trustees for the time being of the . . . Cornelia and East Dorset Hospital and by them to be appropriated for or towards the building funds of the said hospital." She made her will in 1945; the National Health Service Act, 1946, came into force on 6th July, 1948, and she made a codicil after the Act came into force without altering her will. The plaintiffs, as executors, took out a summons to determine the effect of the gift having regard to the coming into force of the Act of 1946.

VAISEY, J., said that the question was, did this legacy go to the defendant hospital management committee, as undoubtedly it would have done if the testatrix had left it to be applied to the general purposes of this hospital, or did the fact that she had given it not only as a gift to a particular hospital but for a particular purpose of a particular hospital make any difference? He did not on the whole think that it made any difference. The case was governed by *In re Morgan's Will Trusts* [1950] Ch. 637 and *In re Glass* [1950] Ch. 643*n*. The gift would therefore go to the appropriate hospital management committee, with a direction that it was to be used for the building fund purposes of that particular hospital, which meant not only new buildings but would include maintenance and improvement of existing buildings. Declaration accordingly.

APPEARANCES: *A. H. Droop* (*Peacock & Goddard*, for *Trevanion and Curtis*, Poole); *E. M. Winterbotham* (*Sharpe, Pritchard & Co.*, for *J. S. Tapsfield*, Bournemouth); *J. A. Plowman* (*Taylor, Jelf & Co.*, for *R. S. Hawkins*, Poole); *Denys Buckley* and *B. J. H. Clauson* (*Treasury Solicitor*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 1132**

QUEEN'S BENCH DIVISION

FOOD AND DRUGS: WHETHER ADULTERATED MILK STILL IN POSSESSION OF FARMER

Challand *v.* Bartlett

Lord Goddard, C.J., Parker and Donovan, JJ. 21st July, 1953

Case stated by East Sussex justices.

The defendant, a dairy farmer, sold milk produced at his farm to the Milk Marketing Board under a contract which provided that the milk should be delivered daily to such places and consignees as the board should direct. The board directed that he should supply and deliver to one *W*, and that the milk should be collected at the farm. Both the defendant and *W* used the dairy at the defendant's farm, *W* for bottling milk, and after cooling the milk the defendant placed it in churns in the centre of the dairy floor, which was agreed between him and *W* as the place of delivery and collection. When the defendant had placed the churns in that position he had done all that was required of him in that regard under the contract and the board's direction. On 11th January, 1952, an inspector of weights and measures purchased from *W* when he was on his delivery round, about a mile from the farm, a sample of milk supplied by the defendant. On 12th January, 1952, the inspector visited the farm and took samples from two churns of milk placed in the centre of the dairy floor awaiting collection by *W*. The samples were found to contain added water, and three informations were preferred against the defendant, charging him (in the case of the milk purchased on 11th January, by virtue of s. 83 (3) of the Food and Drugs Act, 1938) with having in his possession, for the purpose of sale for human consumption, milk to which an addition of water had been made, contrary to s. 9 (1) (*c*) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. The justices considered that the milk purchased on 11th January was not in the possession of the defendant and that the milk taken from the churns on 12th January had passed out of his possession when he had placed it in the agreed collecting point, and they dismissed the informations. The prosecutor appealed.

LORD GODDARD, C.J., said that it was quite right to attempt to take proceedings under s. 83 (3) of the Food and Drugs Act, 1938, but such proceedings must be brought on a proper information which should set out the facts and state that the local authority were satisfied that the breach by the seller was due to the act or default of the defendant. The information charged the defendant with being in possession of the milk, but possession had long before passed to *W*, who was retailing it to customers in the street. The information was not in the right form and the justices came to a right decision with regard to that information. With regard to the other two informations, the milk was held by the defendant for *W*. Although it might be that the property in it had passed to, and remained in, the board until it was collected by *W*, the milk was in the possession of the defendant until *W* collected it. The expression "have in his possession for the purpose of sale" in s. 9 (1) (*c*) of the Act of 1950 was used simply to show that the section was referring to milk treated as an article of commerce and not kept for the farmer's own use. The justices were referred to *Oliver* v. *Goodger* [1944] 2 All E.R. 481; that case had not been followed and had been distinguished in *Kilsby* v. *Horsford* (1949), 93 SOL. J. 601, on the ground that the milk had left the farm premises. He (his lordship), although it was binding on him, felt great doubt whether *Oliver* v. *Goodger* was rightly decided but, as in *Kilsby* v. *Horsford*, it was distinguishable. The second and third informations must go back to the justices with a direction to convict.

PARKER and DONOVAN, JJ. agreed. Appeal allowed in part.

APPEARANCES: *Paul Wrightson* (*Sharpe, Pritchard & Co.*, for *H. S. Martin*, Lewes); *J. H. Gower* (*Langhams & Letts*, for *Dawson & Hart*, Uckfield).

[Reported by Miss J. F. LAMB, Barrister at-Law] **[1 W.L.R. 1105**

RENT TRIBUNAL: NO POWER TO HEAR APPLICATION BY DESERTED WIFE OF TENANT

R. *v.* Twickenham Rent Tribunal; *ex parte* Dunn

Lord Goddard, C.J., Parker and Donovan, JJ. 22nd July, 1953

Motion for an order of mandamus.

The Landlord and Tenant (Rent Control) Act, 1949, provides, by s. 1 (1), that in certain cases "the landlord or the tenant may make application to the tribunal to determine what rent is reasonable" for a dwelling-house. The tenant of a rent-controlled flat deserted his wife and left the flat, notifying the landlord that he had ceased to have any interest in the tenancy. The wife continued to occupy the premises and paid the rent. She applied to a rent tribunal under s. 1 (1) of the Act for a reduction in the rent, making the application as "agent" for her husband and without his consent. The tribunal decided that they had no power to consider the application. She then moved the court for an order of mandamus directing the tribunal to hear and determine the application.

LORD GODDARD, C.J., said that as a result of recent decisions in the Court of Appeal, e.g., *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, it was established that a deserted wife had a right to stay in the matrimonial home, and, if it was subject to the Rent Acts, could not be dispossessed if she paid the rent and observed the covenants. She had implied authority from the husband to remain in the home as a licensee of a very special and anomalous character, but that did not constitute her her husband's agent. At common law she had only the authority to pledge her husband's credit for necessaries. As her husband was making her substantial payments under a court order, it could not be said that he was not providing for her. The recent cases showed that the wife was not a tenant; the terms of the Act required that an applicant must be a tenant, and it would not be right to extend the privileges of the wife so that she could exercise a right which her husband as tenant could have exercised. The tribunal were justified in refusing to entertain her application, and the motion failed.

PARKER and DONOVAN, JJ., agreed. Application dismissed.

APPEARANCES: *R. Willis* and *E. H. Laughton-Scott* (*Willis and Willis*); *M. Band* (*Arthur Robson*); *J. P. Ashworth* (*Solicitor, Ministry of Health*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 517**

TOWN AND COUNTRY PLANNING: FORM OF ENFORCEMENT NOTICE

Godstone R.D.C. *v.* Brazil

Lord Goddard, C.J., Parker and Donovan, JJ. 24th July, 1953

Case stated by Dorking justices.

A local planning authority served on the respondent, an owner of a piece of land, a notice purporting to be an enforcement notice

under s. 23 of the Town and Country Planning Act, 1947, requiring her to remove a caravan from the land "within seven days after the expiry of twenty-eight days from the date of the service of this notice." The respondent having failed to comply with the notice, an information was preferred against her alleging that in December, 1952, and on 12th January, 1953, she had used the land in contravention of the notice. The justices dismissed the information. The prosecutor appealed.

LORD GODDARD, C.J., said that, under s. 23 (3), the enforcement notice came into effect at any period not less than twenty-eight days after service. In *Burgess* v. *Jarvis* [1952] 2 Q.B. 41 and *Mead* v. *Chelmsford R.D.C.* [1953] 1 Q.B. 32 it was held that the notice must state two periods, first, the period after which it came into effect, and secondly, the period thereafter in which the necessary action had to be taken. The present notice was defective in that it did not say that it would take effect after twenty-eight days. The summons was bad, and the justices were right in dismissing it.

PARKER and DONOVAN, JJ., agreed. Appeal dismissed.

APPEARANCES: *L. G. Scarman* (*Sharpe, Pritchard & Co.*); *J. D. James* (*Langhams & Letts*, for *Hart, Scales & Hodges*, Dorking).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1102

BUILDING: DANGEROUS STRUCTURE: NOTICE TO REPAIR

Bewlay & Co., Ltd. *v.* London County Council

Lord Goddard, C.J., Parker and Donovan, JJ. 29th July, 1953

Special case stated by metropolitan magistrate.

The London Building Acts (Amendment) Act, 1939, provides, by s. 64 (1): "If the owner or occupier on whom [a dangerous structure notice] is served . . . fails to comply . . . a court of summary jurisdiction . . . may order the owner . . . to take down, repair or otherwise secure the structure . . ." The appellants were owners of a building, the top of which was occupied by a tenant protected by the Rent Acts. The council served on them a notice requiring them to "take down, repair or otherwise secure" certain portions of the premises alleged to be insecure. The appellants shored up the premises and unsuccessfully attempted to persuade the tenant to leave. At the hearing of a summons taken out by the council, the appellants contended that the magistrate had a discretion, which should be exercised in their favour, as (*a*) the premises were fit only to be pulled down, as repairs would cost more than the structure was worth; (*b*) it was dangerous to execute repairs with the tenants in occupation; and (*c*) the council's surveyor had refused to give a certificate under s. 67 which would enable the tenants to be removed and the premises to be pulled down. The council contended that the magistrate could and should make an order directing the appellants to "take down, repair or otherwise secure" the structure. The magistrate found that the premises were economically not worth repair, but held that he had no discretion in the circumstances to avoid making an order directing the appellants to "take down, repair or otherwise secure" the structure.

LORD GODDARD, C.J., said that it was clear, as a matter of English, that the magistrate could in his discretion order the owner to do one or other of the three alternatives; he had a discretion in the matter; and it might be that in some cases it would be right to make an order in all three terms. The case must go back with an intimation that he was wrong in holding that he had no discretion, as, in view of his finding that repairs were uneconomical, it was open to him to hold that the premises should be taken down.

PARKER and DONOVAN, JJ., agreed. Appeal allowed.

APPEARANCES: *E. J. Rimmer*, Q.C., and *N. Wiggins* (*Bartlett and Gluckstein*); *H. E. Francis* (*Solicitor, L.C.C.*).

Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1110

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Abertillery and District Water Board Order, 1953. (S.I. 1953 No. 1144.)

Act of Sederunt (Alteration of Sheriff Court Fees), 1953. (S.I. 1953 No. 1185 (S.99).)

Agricultural Goods and Services (Marginal Production) Scheme (England and Wales), 1953. (S.I. 1953 No. 1184.) 6d.

Agricultural Orders (Revocation) (Scotland) Order, 1953. (S.I. 1953 No. 1171 (S.98).)

Agriculture Act (Part I) Extension of Period Order, 1953. (S.I. 1953 No. 1147.)

Attendance Centre Rules, 1953. (S.I. 1953 No. 1157.)

British Transport Commission (Compensation to Employees) Regulations, 1953. (S.I. 1953 No. 1193.) 8d.

Condensed Milk (Amendment No. 2) Order, 1953. (S.I. 1953 No. 1164.)

Export of Goods (Control) (Amendment No. 3) Order, 1953. (S.I. 1953 No. 1145.) 5d.

Ground Sulphur (Prices) (Revocation) Order, 1953. (S.I. 1953 No. 1161.)

Herring Industry (Grants for Fishing Vessels and Engines) Scheme, 1953. (S.I. 1953 No. 1187.) 6d.

Hill Cattle (Breeding Herds) (England and Wales) Scheme, 1953. (S.I. 1953 No. 1179.) 6d.

Hill Cattle (Breeding Herds) (Northern Ireland) Scheme, 1953. (S.I. 1953 No. 1180.) 6d.

Hill Cattle Subsidy (Breeding Herds) (England and Wales) Payment Order, 1953. (S.I. 1953 No. 1181.)

Hill Cattle Subsidy (Breeding Herds) (Northern Ireland) Payment Order, 1953. (S.I. 1953 No. 1183.)

Imperial Institute (Variation of the Act of 1925) Order, 1953. (S.I. 1953 No. 1201.)

Importation of Plants (General Licence) (Amendment) Order, 1953. (S.I. 1953 No. 1182.)

Importation of Plants (General Licence) (Amendment) (Scotland) Order, 1953. (S.I. 1953 No. 1186 (S.100).)

International Organisations (Immunities and Privileges of the International Wheat Council) Order, 1953. (S.I. 1953 No. 1188.)

Malt and Potable Spirits (Revocation) Order, 1953. (S.I. 1953 No. 1165.)

National Health Service (General Dental Services) Amendment Regulations, 1953. (S.I. 1953 No. 1178.) 5d.

National Health Service (General Dental Services) Fees (Amendment) Regulations, 1953. (S.I. 1953 No. 1176.)

National Health Service (Service Committees and Tribunal) Amendment Regulations, 1953. (S.I. 1953 No. 1175.) 6d.

National Health Service (Supplementary Ophthalmic Services) Amendment Regulations, 1953. (S.I. 1953 No. 1177.) 5d.

National Insurance (Maternity Benefit and Miscellaneous Provisions) Provisional Regulations, 1953. (S.I. 1953 No. 1153.) 11d.

National Insurance (Maternity Benefit) (Transitional) Regulations, 1953. (S.I. 1953 No. 1154.) 6d.

Nottingham Water Order, 1953. (S.I. 1953 No. 1152.) 5d.

Oils and Fats (Amendment No. 2) Order, 1953. (S.I. 1953 No. 1155.)

School Health Service and Handicapped Pupils Regulations, 1953. (S.I. 1953 No. 1156.) 8d.

Scotch Whisky (Auction Sales) (Revocation) Order, 1953. (S.I. 1953 No. 1166.)

Stopping up of Highways (Lancashire) (No. 5) Order, 1953. (S.I. 1953 No. 1148.)

Stopping up of Highways (London) (No. 10) Order, 1953. (S.I. 1953 No. 1142.)

Sulphuric Acid (Prices) (Revocation) Order, 1953. (S.I. 1953 No. 1160.)

Telegraph (British Commonwealth and Foreign Written Telegram) Amendment No. 3 Regulations, 1953. (S.I. 1953 No. 1162.) 6d.

Therapeutic Substances Amendment Regulations, 1953. (S.I. 1953 No. 1172.)

Therapeutic Substances (Control of Isoniazid) Regulations, 1953. (S.I. 1953 No. 1173.)

Therapeutic Substances (Supply of Antibiotics for Agricultural Purposes) Regulations, 1953. (S.I. 1953 No. 1174.)

Veterinary Surgeons (Annual Fees) Order of Council, 1953. (S.I. 1953 No. 1150.)

Veterinary Surgeons (University Degrees) (Application) Order of Council, 1953. (S.I. 1953 No. 1149.)

Welwyn Garden City Water (Variation of Limits) Order, 1953. (S.I. 1953 No. 1189.)

White Fish Industry (Grants for Fishing Vessels and Engines) Scheme, 1953. (S.I. 1953 No. 1163.) 6d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.

NOTES AND NEWS

Honours and Appointments

Colonel JOHN DOUGLAS KERRISH, solicitor, of Liverpool, has been elected chairman of the Liverpool Shipwreck and Humane Society in succession to Lieut.-Col. J. R. Danson.

Mr. R. D. NEWILL, at present Clerk to Wellington Justices, will combine that post with similar duties to the Newport (Salop) Bench from 1st October next.

The Lord Chancellor has made the following appointments and arrangements for re-grouping certain county courts as from 1st August, 1953 :—

Mr. C. CHIEVELEY WILLIAMS, O.B.E., Registrar of Blandford, Bournemouth, Dorchester, Poole, Ringwood, Swanage, Weymouth and Wimborne Minster County Courts and District Registrar of Bournemouth District Registry, to be, in addition, Registrar of Salisbury County Court and District Registrar of the Salisbury District Registry, but to be relieved of the Registrarship of Dorchester and Weymouth County Courts and the District Registrarship of Dorchester District Registry.

Mr. C. J. P. C. JOWETT, Registrar of the Yeovil, Axminster, Bridport, Chard and Wincanton County Courts and District Registrar of Yeovil District Registry, to be, in addition, Registrar of Dorchester, Shaftesbury and Weymouth County Courts and District Registrar of Dorchester District Registry.

Mr. ERIK F. G. RHODES, A.F.C., Registrar of the Portsmouth, Lymington, Petersfield and Southampton County Courts and District Registrar of Portsmouth and Southampton District Registries, to be, in addition, Registrar of Andover County Court.

Miscellaneous

JUDGMENT SUMMONSES IN THE HIGH COURT OF JUSTICE IN BANKRUPTCY

Mr. Justice Harman, Mr. Justice Danckwerts and Mr. Justice Upjohn have directed that, in future, at the hearing of a judgment summons in bankruptcy the sum of £2 4s. 6d. may be allowed for counsel.

27th July, 1953.

THE SOLICITORS ACTS, 1932 TO 1941

On 23rd June, 1953, an Order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that ISIDORE LEVIN (otherwise known as IAN ISIDORE LEVIN) of 21 Islington, Liverpool, 3, be suspended from practice as a solicitor for a period of three (3) years from 23rd July, 1953, and that he do pay to the complainant his costs of and incidental to the application and inquiry. Upon the application of the said Isidore Levin, the Committee directed that the filing of the Findings and Order with the Registrar of Solicitors be suspended during the period allowed for an appeal, and, in the event of an appeal being lodged, until the hearing and determination of such appeal, the operation of the Order to commence from the date of filing of the Findings and Order with the Registrar. The said Isidore Levin appealed from the said Order, and the appeal was heard by the Divisional Court (Queen's Bench Division) on 28th July, 1953, when the court ordered that the appeal be dismissed with costs to be paid by the said Isidore Levin to the said Registrar of Solicitors and to the complainant or their respective solicitors.

DEVELOPMENT PLANS

BARROW-IN-FURNESS DEVELOPMENT PLAN

On 9th July, 1953, the Minister of Housing and Local Government approved (with modifications) the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the office of the Borough Engineer and Surveyor at the Town Hall, Barrow-in-Furness. The copy of the plan so deposited will be open for inspection, free of charge, by persons interested between 8.45 a.m. and 5.30 p.m. from Monday to Friday. The plan becomes operative as from 31st July, 1953, but if any person aggrieved by the plan desires to question the validity thereof, or of any provision contained therein, on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 31st July, 1953, make application to the High Court.

In the note in last week's issue regarding the miniature Business Efficiency Exhibition to be staged at Scarborough for the benefit of delegates to the annual conference of The Law Society, the opening date should have read 22nd September, 1953.

Wills and Bequests

Colonel Claude Herbert Dick Bonnett, O.B.E., solicitor, of Gray's Inn and Hounslow, Middlesex, left £32,326.

Mr. John Raymond Dawbarn, solicitor, of Wisbech, left £36,351 (£33,355 net).

Mr. Samuel Hilton, solicitor, of Torquay, left £19,443 (£18,756 net).

Mr. Herbert Joseph Holme, solicitor, of Liverpool, left £54,528.

Mr. Reginald Nowell Salt, solicitor, of Shrewsbury, left £9,617 (£9,522 net).

OBITUARY

MR. T. F. ELLISON

Mr. Thomas Frederick Ellison, solicitor, of Gray's Inn Square, died on 1st August, aged 64. He was admitted in 1912.

MR. L. FRANCIS

Mr. Llewellyn Francis, Registrar of Cardiff and Barry County Courts and District Registrar to the High Court in Cardiff, died on 29th July, aged 63. Last April he was installed as president of the Association of Registrars of County Courts.

MR. L. C. JENKINS

Mr. Leonard Cottrell Jenkins, solicitor, of Liverpool, died on 1st August, aged 66. He was admitted in 1922.

MR. R. M. KELLY

Mr. Raymond Maxwell Kelly, D.F.C., solicitor, died on 29th July, at Barrow-in-Furness, aged 34.

MAJOR E. G. MOORE

Major Edward Galbraith Moore, solicitor, of Liverpool, died on 4th August, aged 50. He was admitted in 1925.

SOCIETIES

At the monthly meeting of the Board of Directors of the SOLICITORS' BENEVOLENT ASSOCIATION, held on 1st July, Mr. Hugh D. P. Francis, C.B.E., M.C., T.D., of London, was elected a member of the board. Ten solicitors were admitted as members of the Association, bringing the total membership up to 7,698. Grants totalling £3,262 11s. 8d. were made to twenty-three beneficiaries, £65 of which was in respect of "special" grants for holidays, clothing, etc. New applications for relief continue to come in, and the support of those solicitors who have not yet joined their own professional Benevolent Association is earnestly sought. The minimum annual subscription is £1 1s. and a life membership subscription £10 10s. Further information will gladly be supplied on request to the Secretary, Clifford's Inn, Fleet Street, London, E.C.4.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices : 102–103 Fetter Lane, London, E.C.4. Telephone : CHAncery 6855.

Annual Subscription : Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).